WOODSVILLE SDN BHD

v.

TIEN IK ENTERPRISES SDN BHD & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
ARIFIN ZAKARIA JCA
MOHD GHAZALI YUSOFF JCA
JAMES FOONG J
[CIVIL APPEAL NOS: W-02-438-2000, W-02-457-2000, W-02-458-2000, W-02-459-2000 & W-02-460-2000]
11 DECEMBER 2004

CIVIL PROCEDURE: *Action - Consolidation of actions - Whether there was an express order of court for consolidation of four petitions - Whether finding of Supreme Court that parties agreed to consolidation final and binding - Whether there were directions for actions to be deconsolidated - Whether four petitions should be proceeded with as consolidated actions*

In respect of these five appeals arising from the decision of the High Court in petition Nos. D2-28-187-90, D2-28-192-90, D2-28-197-90 and D2-28-202-90 ('the four petitions'), the main issue requiring determination by this court was whether the preliminary objection raised by the liquidators against the notice of appeal filed by the petitioner had any merits. The basis for the objection was that the High Court had not made a consolidation of the four petitions and, thus, it was contended by the liquidators that the petitioner ought to have filed four separate notices of appeal for the parties involved. The liquidators also submitted that there was a sealed High Court order dated 26 October 1998 for merely a joint hearing, and a sealed High Court order dated 31 May 2000 (the very subject matter of these appeals) that did not show any consolidation of the four petitions. The petitioner, although conceding that no order for the consolidation of the four petitions had been extracted, alleged that the learned High Court judge had referred to the four petitions as a consolidated petition. Furthermore, the case went up on appeal to the Supreme Court and since the Supreme Court had proceeded on the premise that the four petitions had been duly consolidated, it was too late for the liquidators to complain at this stage.

Held (dismissing the preliminary objection)
Per Arifin Zakaria JCA delivering the judgment of the court:

[1] It was not in dispute that there was no express order of the court for the consolidation of the four petitions. The petitioner relied on the intitulements of the High Court and Supreme Court judgments showing that the four petitions had been consolidated. Judging from the judgment of the Supreme Court, the issue of consolidation of the four petitions must have been raised before the court or the court would not have made the finding as it did. The Supreme Court in its judgment clearly stated that it made the finding based on the notes of proceedings before the court showing that the parties had agreed to the consolidation, and for that reason, it was no longer open to the parties to complain about it. That finding was final and binding, and therefore, the four petitions must be treated as being consolidated pursuant to the order of the High Court. (pp 861 b, f-g & 862 b)

[2] In respect of the liquidators' contention that the sealed orders of the High Court dated 26 October 1998 and 31 May 2000 had been regularly obtained and the petitioner was estopped from denying the same, this court was of the view that these two orders could not alter the order for consolidation made earlier. The only way for either of the parties to overcome the earlier order for consolidation was for them to apply to the court for a deconsolidation order. This had not been done, and upon scrutiny of these two orders, there were no directions that the actions herein be deconsolidated. In the circumstances, the four petitions remained consolidated and should be proceeded with as consolidated actions. (p 862 c-e)

*[**Bahasa Malaysia** Translation Of Headnotes*

Dalam kelima-lima rayuan terhadap keputusan Mahkamah Tinggi dalam petisyen-petisyen no. D2-28-187-90, D2-28-192-90, D2-28-197-90 dan D2-28-202-90 ('keempat-empat petisyen') di sini, isu penting yang menuntut keputusan mahkamah semasa adalah sama ada bantahan awal yang dibangkitkan oleh penyelesai-penyelesai terhadap notis rayuan yang difailkan oleh pempetisyen mempunyai merit. Asas bantahan tersebut adalah bahawa Mahkamah Tinggi tidak menyatukan keempat-empat petisyen, berikutan mana, menurut hujah penyelesai-penyelesai, pempetisyen perlu memfailkan empat notis rayuan yang berasingan untuk pihak-pihak terlibat. Penyelesai-penyelesai juga mengatakan bahawa terdapat satu perintah termeterai Mahkamah Tinggi bertarikh 26 Oktober 1998 yang hanya merujuk kepada perbicaraan bersama, dan satu perintah termeterai Mahkamah Tinggi bertarikh 31 Mei 2000 (yang menjadi

asas kepada rayuan-rayuan di sini) yang tidak menunjuk kepada sebarang penyatuan keempat-empat petisyen. Pempetisyen mengakui tentang ketiadaan perintah penyatuan, tetapi mengatakan bahawa yang arif hakim Mahkamah Tinggi telah merujuk kepada keempat-empat petisyen sebagai petisyen yang disatukan. Selain itu, kes sudah pun dirayu sehingga ke Mahkamah Agung, dan oleh kerana Mahkamah Agung telah mendengarnya sebagai petisyen-petisyen yang telah disatukan dengan sempurnanya, maka adalah terlambat bagi penyelesai-penyelesai untuk membuat bantahan di peringkat ini.

Diputuskan (menolak bantahan awal)
Oleh Arifin Zakaria HMR menyampaikan penghakiman mahkamah:

[1] Tidak dinafikan bahawa tidak terdapat apa-apa perintah khusus bagi menyatukan keempat-empat petisyen. Pempetisyen bergantung kepada tajuk penghakiman-penghakiman Mahkamah Tinggi dan Mahkamah Agung yang menunjukkan bahawa keempat-empat petisyen telah disatukan. Melihat kepada penghakiman Mahkamah Agung, isu penyatuan keempat-empat petisyen tentunya telah dibangkit di hadapan mahkamah itu, kerana, jika tidak, mahkamah tersebut tidak akan membuat keputusan seperti yang dibuatnya. Mahkamah Agung dalam keputusannya menyatakan dengan jelas bahawa ia membuat dapatannya itu berdasarkan kepada nota prosiding yang ada di hadapan mahkamah yang menunjukkan bahawa pihak-pihak telah bersetuju dengan penyatuan, dan dengan itu, adalah tidak terbuka bagi pihak-pihak untuk bersungut mengenainya. Dapatan tersebut adalah muktamad dan mengikat, dan kerana itu, keempat-empat petisyen hendaklah dianggap sebagai telah disatukan ekoran dari perintah Mahkamah Tinggi.

[2] Berkaitan pengataan penyelesai-penyelesai bahawa perintah-perintah termeterai Mahkamah Tinggi bertarikh masing-masing pada 26 Oktober 1998 dan 31 Mei 2000 telah diperolehi dengan secara teratur dan bahawa pempetisyen adalah diestop dari menafikannya, mahkamah ini berpendapat bahawa perintah-perintah ini tidak boleh mengubah perintah penyatuan yang dibuat sebelumnya. Satu-satunya cara untuk pihak-pihak mengatasi perintah penyatuan sebelumnya adalah untuk mereka memohon kepada mahkamah untuk perintah pemisahan. Ini tidak dibuat dan, meneliti kedua-dua perintah, jelas bahawa tiada apa-apa perintah dibuat supaya tindakan-tindakan di sini dipisahkan. Oleh yang demikian, keempat-empat petisyen masih lagi disatukan dan hendaklah diteruskan sebagai tindakan-tindakan yang disatukan.*]*

Case(s) referred to:
Gurbachan Singh v. Seagrott & Campbell (no 2) [1962] MLJ 370 ***(refd)***
Lee Lan v. Lim Yoon Loy [1991] 3 CLJ 2393; [1991] 1 CLJ (Rep) 251 SC ***(refd)***
Lewis v. Daily Telegraph (No 2) [1964] 2 MLJ QB 601 ***(refd)***

Legislation referred to:
Rules of the Court of Appeal 1994, r. 5

For the appellant - Lim Kian Leong (Ong Chee Kwan with him); M/s Lee Ong & Kandiah
For the 1st respondent - Wong Kian Kheong (Absent); M/s Lee Hishammuddin
For the 2nd, 3rd, 4th & 5th respondents - Alvin Tang (Claire Skelchy with him); M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Companies Winding Up Nos: D2-28-187-1990, D2-28-192-1990, D2-28-197-1990 & D2-28-202-1990]

Reported by Suresh Nathan

JUDGMENT

Arifin Zakaria JCA:
These five appeals arose from the decision of the High Court in petitions Nos. D2-28-187-90, D2-28-192-90, D2-28-197-90 & D2-28-202-90.

For the purpose of these appeals the following facts were not disputed. Woodsville Sdn. Bhd., the appellant/petitioner in W-02-438-00 is the common petitioner in the 4 petitions ("the petitioner"). The petitioner is a nominee company of one Kuok Khoon Hwong also known as Peter Kuok. On 9 June 1994, the High Court ordered the 4 companies to be wound up and at the same time turned down the application of the 4 respondents in appeal No. W-02-438-00 for a voluntary winding up of the 4 companies. Mustapha Mohamed and Gong Wee Ning from Messrs. Coopers & Lybrand were duly appointed as liquidators of the 4 companies ("the liquidators"). Subsequent thereto by summons in chambers the liquidators applied for leave to resign from the office of liquidators of the 4 companies. The petitioner in the 4 petitions in turn applied for the removal of the liquidators. The applications by the liquidators and the petitioner in petitions Nos. D2-28-187-90, D2-28-192-90, D2-28-197-90 and D2-28-202-90 were ordered to be heard together. The relevant order of the court is found at pp. 28 to 35 of the Record of Appeal. On 31 May 2000 the High Court dismissed with costs both the applications by the petitioner and the liquidators.

The petitioner and the liquidators were dissatisfied with the said decision of the learned trial judge and appealed against the said decision. The appeals came up for hearing before us on 24 February 2004, and at the inception Mr. Wong Kian Kheong learned counsel for the 1st respondent in appeal No. W-02-438-00 and for the appellants for appeals Nos. W-02-457-00, W-02-458-00, W-02-459-00 and W-02-460-00 raised a preliminary objection against the notice of appeal dated 26 June 2000 filed herein by the petitioner.

The basis for the objection is contained in the letter of 18 February 2004. It is contended that no consolidation of the 4 petitions was ever made by the High Court. He contended that on 26 October 1996, the court had merely ordered that the removal applications made by the petitioner ("the removal applications") be heard together with the 4 applications filed by the liquidators for resignations ("the resignation applications"). He said the parties at the hearing of the removal applications merely agreed amongst counsel for all the parties that the decision of the removal application in the first petition will be binding on all similar applications filed in the second, third and fourth petitions. This he said is evident from the judgment of the learned judge dated 31 May 2000. In the above circumstances, he contended the petitioner ought to have filed and served 4 separate notices of appeal for Tien Ik Enterprises Sdn. Bhd., Tien Ik Credit Sdn. Bhd., Giltspur Holdings Sdn. Bhd. and Tien Ik Sdn. Bhd. ("TIESB, TICSB, GHSB and TISB") appealing against the decision of the High Court of 31 May 2000.

In the result he submitted the appellant has not brought a valid appeal on behalf of TIESB, TICSB. GHSB and TISB against the said decision. In support of his submission he relied on the following:

(a) rule 5 of the Rules of the Court of Appeal 1994;

(b) *Lee Lan v. Lim Yoon Loy* [1991] 3 CLJ 2393; [1991] 1 CLJ (Rep) 251; and

(c) *Gurbachan Singh v. Seagrott & Campbell (No. 2)* [1962] MLJ 370.

On 24 February 2004 after hearing submissions on the preliminary objection, we adjourned the matter, to enable parties to put in written submissions. The parties have since put in their written submissions for our consideration. Having considered both the oral and written submissions we now give our decision on the preliminary objection.

It is not in dispute that only one notice of appeal was filed on behalf of the petitioner which reads:

DALAM MAHKAMAH RAYUAN MALAYSIA
(BAHAGIAN RAYUAN)
RAYUAN SIVIL NO. W-02-438-2000

ANTARA

WOODSVILLE SDN. BHD … PERAYU

DAN

1. TIEN IK SDN. BHD.
2. DAVID KUOK KHOON HIN
3. IRENE KUOK
4. HELEN KUOK … RESPONDEN-
5. BERNARD KUOK RESPONDEN

(Dalam Perkara Mengenai Penggulungan Syarikat No. D2-28-202-1990
Di Mahkamah Tinggi Malaya di Kuala Lumpur

ANTARA

WOODSVILLE SDN. BHD … PEMPETISYEN

DAN

1. TIEN IK SDN. BHD.
2. DAVID KUOK KHOON HIN
3. IRENE KUOK
4. HELEN KUOK … RESPONDEN-
5. BERNARD KUOK RESPONDEN

NOTIS RAYUAN

AMBIL PERHATIAN bahawa WOODSVILLE SDN. BHD., Perayu tersebut di atas tidak puas hati dengan keputusan Yang Arif Dato' Abdul Aziz bin Mohamad yang diberikan dalam Mahkamah Tinggi Kuala Lumpur pada 31 haribulan Mei 2000 merayu kepada Mahkamah Rayuan terhadap keputusan yang memerintahkan bahawa permohonan Perayu/Pempetisyen untuk melucutkan Likuidasi-Likuidasi dalam syarikat-syarikat Tien Ik Enterprises Sdn. Bhd., Tien Ik Credit Sdn. Bhd., Gilspur Holdings Sdn. Bhd. dan Tien Ik Sdn. Bhd. ditolak dengan kos.

Bertarikh pada 26 haribulan Julai 2000.

t.t.
Peguamcara Bagi Perayu
Lee Ong & Kandiah.

It would appear that the notice of appeal filed herein purports to be an appeal brought on the basis that the 4 petitions had been duly consolidated.

Since there was only one notice of appeal filed the liquidators submitted that there is no valid notice of appeal filed in respect of each of the 4 petitions and as such this court has no appellate jurisdiction to hear the appeal.

Further it is submitted for the liquidators that the notice is null and void for the following reasons:

(a) there is no court order consolidating the four (4) Petitions;

(b) there is a sealed High Court Order dated 26.10.1998 for merely a joint hearing not a consolidation, of the Appellant's four (4) Removal Applications and the Liquidators' four (4) Resignation Applications (please see Tag 6 LBA). It is to be noted that the High Court Order dated 26.10.1998 was obtained in the presence of the then Appellant's learned counsel, Mr. Ong Chee Kwan, from Messrs. Lee Ong & Kandiah who are still the Appellant's solicitors for the purpose of this appeal; and

(c) the sealed High Court Order dated 31.5.2000 (please see Tag 8 LBA) which is the very subject matter of this appeal and which has been prepared and extracted by the Appellant's solicitors, does not show any consolidation of the four (4) Petitions;

(d) under s. 114(e) Evidence Act 1950 (Tag A attached to the Liquidators' Reply) there is a rebuttable presumption that the sealed High Court Orders dated 26.10.1998 and 31.5.2000 have been regularly obtained. Indeed, the Appellant has neither appealed nor applied to set aside the High Court Order dated 26.10.1998. As such, the High Court Order dated 26.10.1998 is *res judicata* and binding on all parties, including the Appellant. Similarly, the Appellant has not made any application for leave to amend the sealed High Court Order dated 31.5.2000 to reflect the purported consolidation of the four (4) Petitions;

and

(e) in any event, the Appellant is estopped from denying the sealed High Court Orders dated 26.10.1998 and 31.5.2000 because of the conduct of the Appellant's solicitors as explained in:

(i) paragraphs 4, 5, 6, 8, 11(b)-(e) at pages 2-3 of the Liquidators First Submission; and

(ii) the aforesaid sub-paragraphs 8(b)-(d) of the Liquidators' Reply.

Mr. Lim Kian Leong learned counsel for the petitioner conceded that no order for consolidation of the 4 petitions has been extracted. However, he said the learned High Court Judge in her grounds of judgment dated 9 June 1994 had referred to the 4 petitions as a consolidated petition. Further when the case went up on appeal to the Supreme Court, and the Supreme Court in its judgment had treated the 1st petition as being consolidated with 3 other petitions. He submitted that the consolidation was agreed to by all parties at the High Court and the matter went up on appeal to the Supreme Court on that premise. Further he submitted there is no specific provision for consolidation in the Winding Up Rules unlike in the High Court Rules. In any case he said since the Supreme Court had proceeded on the premise that the petitions had been duly consolidated, it is too late for the liquidators to complain at this stage.

It is not in dispute that the High Court order of 26 October 1998 merely ordered that the application by the liquidators filed under Companies (Winding-up) Petition No. D2-28-187-90 in the High Court Kuala Lumpur to, among others, resign as liquidators of the TIESB be heard together with eleven other applications set out in the said order. The order of High Court dated 31 May 2000, which is the subject of the appeal, again does not show that the 4 petitions had been consolidated.

The respondent, on the other hand, contended that the 4 petitions had been duly consolidated on the following grounds:

1. The 4 winding up petitions have been consolidated as a matter of fact and of law and therefore the Notice of Appeal in the consolidated format is correct;

2. The liquidators themselves have filed applications in the course of proceedings in the High Court in a consolidated format and are therefore estopped from making the preliminary objection.

3. In view of ground 2 above the preliminary objection has been made in bad faith and is an abuse of process;

4. Even if the preliminary objection is technically correct (which is denied), in the interest of justice and under the Rules of the High Court and the amended Court of Appeal Rules, the appeal should be allowed to proceed, as there has been no prejudice to the liquidators; and

5. Even if the preliminary objection is allowed, it would be rendered academic because the petitioner could still proceed with the first petition and following the agreement in the winding up petitions, all the parties have agreed that they are bound by decision in the first petition.

It is not in dispute that there was no express order of the court for the consolidation of the 4 petitions. The petitioner relies on the intitulements of the High Court and Supreme Court judgment showing that the 4 petitions had been consolidated. This is further supported by the judgments of the High Court and the Supreme Court. The learned High Court judge in her judgment stated:

> In these 4 consolidated petitions, the parties who are the shareholders of the 4 companies sought to be wound up under section 218(1)(1) of the Companies Act, 1965 ("the Act"), agree as a matter of convenience to proceed with the first of such petitions files in D2-28-187-90 and that orders to be made in this first petition will govern the other petitions as well.

On this same issue the Supreme Court in their judgment stated as follows:

> The four separate petitions were consolidated by consent of both parties. They agreed as a matter of convenience to proceed with the first petition in D2-28-187-90 and agreed that orders made in the first petition would bind the other petitions as well. The learned judge said so in her written judgment and these are borne out by the notes of evidence recorded by the learned judge. As it happened, the learned judge after hearing the first petition and making the orders therein made similar orders for the other petitions.
>
> We do not think the judge was wrong in this respect. The parties themselves had agreed to the procedure adopted. They cannot now complain. The parties in the four petitions are the same. The facts relied on are the same.

Judging from the judgment of the Supreme Court, the issue of consolidation of the 4 petitions must have been raised before the court otherwise the court would not have made the finding as it did. The Supreme Court in its judgment clearly stated that it made the finding based on the notes of proceedings before the court showing that the parties had agreed to the consolidation and for that reason it was no longer open to the parties to complain about it.

Learned counsel for the liquidators further submitted that intitulements to the judgments of the High Court and the Supreme Court are not part of the judgments and is not binding on this court. However, it could not be denied that the intitulements of any judgment will follow the title in the action and if two or more actions had been consolidated then the titles to the actions will state that the actions had been so consolidated.

On the findings by the High Court and the Supreme Court that these 4 petitions had been consolidated the learned counsel for the liquidators submitted that this finding is not the *ratio decidendi* in this case, but merely *obiter dicta*, therefore, they are not binding on this court. With respect to the learned counsel we do not think that is the issue before us. We are here considering whether or not the finding of the Supreme Court on the issue of consolidation of the 4 petitions is binding on this court. In this regard we agree with the petitioner that the Supreme Court in its judgment had clearly made a finding on this issue and that finding, in our view, is final and binding on us. Therefore, based on that finding the 4 petitions must be treated as being consolidated pursuant to the order of the High Court.

On the contention of the counsel for the liquidators that the sealed orders of the High Court dated 26 October 1998 and 31 May 2000 have been regularly obtained and the petitioner is therefore estopped from denying the same, we are of the view that these two orders of the High Court could not alter the order for consolidation which was made earlier. The only way for either of the parties to overcome the earlier order for consolidation is for the parties to apply to the court for a deconsolidation order. (See *Lewis v. Daily Telegraph (No. 2)* [1964] 2 MLJ QB 601 CA).) This has not been done.

Upon scrutiny of the two orders of the High Court dated 26 October 1998 and 31 May 2000, we find nothing in these two orders directing that the actions herein be deconsolidated. In the circumstances we hold that the 4 petitions remained consolidated and should be proceeded with as consolidated actions.

For the above reasons we hold that there is no merit in the preliminary objection raised by the liquidators and we dismissed the same with costs.